

## APPENDIX 1

**PROPOSED RESPONSE TO THE SCOTTISH GOVERNMENT CONSULTATION ON THE NEW ENFORCEMENT REGULATIONS****Fixed Penalty Notices**

The National Park Authority considers that the legislative provisions relating to the issuing of Fixed Penalty Notices (FPN) are fundamentally flawed in relation to the issuing of a FPN following non-compliance with an Enforcement Notice. The service of such a notice provides for the right of appeal. Only if that appeal is dismissed, and the notice is then not complied with, is that ability to issue a FPN available. Following service of the FPN, should the requirements of the notice remain unmet, prior to the service of a second FPN (necessary in order to increase the penalty), a further enforcement notice must be served. Under the current legislative provisions a second right of appeal would be available and, conceivably, at this stage the second appeal might be allowed. Under such circumstances would the Planning Authority be liable for the refund of any fine collected in respect of the first FPN? Furthermore, the service of a second (or even third or fourth etc.) notice merely to seek to raise the level of the penalty, if the right of appeal remains, will serve only to prolong the undesirable effects of the unauthorised development. To ensure that the system of FPNs has the effect desired by the Scottish Ministers the right of appeal against second and subsequent notice served in respect of the same breach of planning control, merely in order to raise the level of penalty, must be removed.

In contrast the service of a FPN in respect of non-compliance with a Breach of Condition Notice (BCN) served under the provisions of Section 145 of the 1997 Act is sensible and workable new tool in the enforcement 'tool kit', given that no right of appeal against a BCN exists.

**Q1. Do you support the proposal that penalties should be increased for continuing breaches and if not, why not?**

In theory the proposal that penalties are increased appears to have merit. However, in practice, for the reasons set out above, it is considered that the present draft regulations are flawed with respect to subsequent rights of appeal. Again, as set out above, with respect to BCNs the FPN system will be more straightforward.

**Q2. Do you have any views on the proposed amounts for the fixed penalty, in particular the proposed initial amounts?**

Whilst the level of the initial FPN (£1000 in respect of a first enforcement notice, increasing in steps of £500 to a maximum of £5000) may have a deterrent effect for the householder or small scale developer, even the maximum penalty would not deter the large scale developer. With respect to the FPNs served following not compliance with a BCN (£100 in respect of the first notice increasing in steps of £50 to a maximum of £300), again the deterrent effect will only exist for smaller scale developers. The existing ability to prosecute and/or take direct action will remain the most likely course of action in respect but all but the most straightforward of cases.

**Q3. Do you have any views on the proposed increase in the amount of each subsequent fixed penalty, in particular with regard to the number of FPNs that would be required to reach the maximum and whether the fixed penalty should increase by a larger amount for each subsequent offence?**

Further consideration should be given by the Scottish Government to increasing the amount of additional penalty upon the service of second and subsequent notices, in order that the deterrent effect is increased, and the maximum fine can be reached more quickly. Consideration should also be given to increasing the maximum fine in respect of FPNs served under the provisions of both Sections 136A and 145A. At present 9 enforcement notices or 5 BCNs would be required to be served in order for the maximum fine to be levied in each instance.

In conclusion it is considered by the National Park Authority that the perceived benefits of the new FPN provisions will be far outweighed by the length of time taken, and the number of notices that would require to be served, to reach the maximum possible fine, which in itself inadequate for all but the householder and small scale developer. As proposed it is considered unlikely that the new provisions would be used on other than a small number of occasions; if they are to be an effective tool a complete re-think is therefore required.

**Notification of Initiation of Development and Notice of Completion of Development**

The National Park Authority has successfully operated a voluntary NID system since 2004, and it is therefore considered that placing this approach to monitoring development on a statutory footing is excellent. The position regarding non-compliance with this new requirement appears confused however. In Section 6(2) of the Planning etc. (Scotland) Act 2006 it states that new Sections 123(1)(c) and 123(1)(d) will be inserted into the 1997 Act. These provisions would make development commenced without the prior submission of a NID unauthorised, and liable to the taking of enforcement action. The draft regulations on the other hand refer to the use of a 'standard condition' drawing a developer's attention to the requirement to submit a NID, with the subsequent penalty being implied as the service of a BCN if there is non-compliance. Clarification of the penalty provisions would be of assistance. The introduction of NCDs, placed on the same statutory footing as NIDs, is welcomed.

Whilst the new NID and NCD provisions are welcomed it must be noted however, that the commencement of the new regime will place an additional and significant burden on Planning Authority's. Whilst at the National Park Authority such a system has been in operation for a number of years it is known that many Authority's do not currently have the systems in place, or the resources, to undertake monitoring on the scale soon to be required. Should additional resources not be provided by Authority's, it is likely that other areas of enforcement work (such as responding to complaints) will suffer. This will inevitably lead to an escalation of the number complaints to the Authority and to the Scottish Public Services Ombudsman.

**Q4. Do you have any views on the proposed level of information requested in the NID or any suggestions for other information, for example declaring that any suspensive conditions had been met, might be useful?**

The requirement for a NID to contain details of the planning application about to be implemented, the developers name, address and contact details would seem essential minimum requirements. It is also agreed that a declaration that any suspensive conditions have been met would be useful (although an inspection of the case file upon receipt of an NID would reveal the same).

The National Park Authority has some concerns however regarding the requirement for any past enforcement actions taken against a developer to be declared through the NID process. By adopting such an approach there is a very real danger that enforcement action will be taken because of the poor 'track record' of the developer, rather than after having regard to the provisions of the development plan and other material considerations. This provision effectively implies that a developer cannot reform, and is liable, rather than to ensure effective enforcement action is taken in the public interest, to provide a basis for poor decision making. The other side of this line of thinking is that the new provisions would fail to 'catch' the deliberate and serial offender who continually changes the name of his company simply to avoid any declaration of previous wrongdoing.

**Q5. Are you content with the proposed time limits for recording relevant enforcement action?**

Previous enforcement action should not be recorded (see answer to Q4 above).

**On-site Notices**

On site notices will be required to be displayed at the commencement of national, major and bad neighbour development. It is considered that the introduction of these new provisions will generally increase awareness by the public of the nature of approved developments, and will allow potential breaches of planning control to be brought to the Planning Authority's attention swiftly, and at a stage where a remedy is potentially more straightforward.

**Q6. Bearing in mind that the purpose of the notice is to make people aware of the development and direct them to the appropriate contacts for further information, are you content with the level of information to be included?**

The proposed Regulations indicate that only the address of the development, the name of the developer, the details of the application and date of permission, and the Planning Authority contact details would be included on the notice. It is suggested that a copy of the decision notice might also form a part of the prescribed on-site notice, and that for certain classes of development a copy of the approved plans also.

**Q7. Are you content with the proposed categories of development for which notices would be required to be displayed, and if not, why not?**

Yes (i.e. for national, major and bad neighbour development only).

**Q8. Do you consider this sufficient, or would you like to suggest other criteria for the siting, display, size, etc, of these notices.**

The Regulations should give more precision to the meaning of "in a prominent place", and should specify minimum size requirements for the proposed on-site notices.

### **Temporary Stop Notice**

There is currently only a power to serve a Stop Notice in association with an Enforcement Notice, in order to stop an unauthorised activity or development, especially where there is a significant threat to amenity. This is, however, a relatively slow and unwieldy process. Section 26 of the 2006 Act provides planning authorities with the power to issue a Temporary Stop Notice (TSN), as a means of speeding up and simplifying the procedure for stopping unauthorised development. These notices are valid for up to 28 days, and could be effective from the time they were served, without requiring an enforcement notice. Equivalent TSN provisions have been in operation in England and Wales for a number of years, and appear to be well supported and used.

**Q9. Are you content with the proposed draft Regulations and if not, why not?**

Section 144B of the 2006 Act set outs that a TSN may not prohibit the use of a building as a dwellinghouse, and provides that Ministers may prescribe other activities where a TSN may not be used. The draft Regulations prohibit the use of a TSN in order to prevent the use occupation of a caravan as a main residence. The Authority has no objections to this provision, which ensures compatibility with the provisions of the Human Rights Act 1998.

**Q10. Are there any other situations where you believe use of a Temporary Stop Notice should not be permitted?**

No.

**Q11. Do you wish to comment generally on the draft Regulations, RIA, EqIA, or other issues in respect of this consultation?**

No